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MICHAEL RODAK, JR.,

No. 74-346

IN THE

Supreme Court of the United States

FEDERAL PRESCRIPTION SERVICE, INC., AND DRIVEX CO.,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, *et al.*,
Intervenors.

PETITIONERS' REPLY

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PETITIONERS' REPLY

I

Reply to Solicitor General

With all due respect, the Solicitor General falls into error by calculating his filing time from the entry of a preliminary form of judgment. The same question was resolved with the Eighth Circuit Clerk by the office of the Clerk of this Court when this petition was filed and also by counsel (see appended letter of the Clerk which the government brief omitted.)

Finality is the key to unraveling the conceded ambiguity of two letters from the Clerk referring to an entry of "judgment". As held in *Scofield* v. *N.L.R.B.*, 394 U.S. 423, 427 (1969)

> "[A] 'judgment for our purposes is final when the issues are adjudged' *and settled with finality* . . ." (emphasis added)

And in *C.I.R.* v. *Bedford's Estate*, 325 U.S. 283, 287 n.3 (1945) it was held that where local rules left the question of finality in doubt, certiorari time would be counted from the official entry of the "Order for Mandate" issued 21 days after the Court's ruling.*

Here the Solicitor General glosses over the fact that the first Clerk's letter of "entry" was, as stated on its face, a form of judgment *"as proposed by petitioner"* (the unsuccessful party) following a significant modification on rehearing and under Local Rule 2(c) remained subject to the Court's power to "stay or recall" and, under 2(d) could be "entered for the court by the clerk" only "if unopposed after due notice to all interested parties".

The settlement of the form of judgment by submission to the parties—particularly where the Board is a party—is hardly a novel proceeding. Here the Board and the Union were being granted 21 days to submit alternative proposals. It was only after they left petitioners' proposed form unopposed that judgment was finally entered and certified on July 2 as stated in the Clerk's letter of that date.

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* Note 1 of the Solicitor General's brief misquotes Rule 41(a) F.R.A.P. which fixes mandate time after rehearing denial at 7 days unless otherwise ordered.

II

Reply to Union Brief

The Union's selective recitation on facts can be responded to in proper detail when and if a hearing on the merits is ordered. For the preliminary certiorari question, the factual summary by the Eighth Circuit is a sufficient rebuttal.

1. Equally, whether or not the bargaining unit was properly redefined into a retroactive card majority is not the problem in the petition. The certiorari issue assumes a card majority and asks whether the Board has power or discretion to set aside an election and order *Gissel* bargaining in the absence of any actual—or reasonably inferable—findings on the anti-elective effect of the employers' conduct. In other words, whether the Court of Appeals here avoided its statutory review burden by according conclusive weight to the Board's silence on the point. True, the *Arbie* rule quoted in the petition was as the Union says, dictum in that case, but not when the principle was used as the *ratio decidendi* in the present decision.

2. The Union appears to agree that bargaining should not be ordered with a Union convicted of organizing violence, and asserts that this is presently the common doctrine of both the Board and the Courts. But the Union's citations, *World Carpets* and *United Minerals*, show the situation to be the contrary, the split occurring on the point of how much violence should be condoned.

The Union then seeks to divorce its own behavior from what it calls "*Employee* Misconduct", "*employee* incidents", or "the limited reaction of a few individuals" and even points to the examiner's conclusion—after the exclusion of the employers' proof—that there was no "damage to person or property". One would search the

Union brief in vain to find that the *Union* itself was convicted and fined, that a jury found the *Union* caused over $18,000 in direct property damage to the employers, that the *Union* ordered its stewards brought into Madrid to lead the strikers in the "acts of terrorism" noted by the Court of Appeals.

3. As the Union's third point, it is said that the evidence of violence did go into the record at the hearing. Some did of course, where it concerned the validity of the employers' discharge of three members of the bargaining unit for their attacks on non-strikers—but even as to these individuals, the Court of Appeals had to reverse their exoneration by the Board. What was left out of the record? Spikes, stoned windows, slashed tires, shooting, the noose and gibbet displayed by the Union, the frightening off of non-strikers and contractors, etc. The emphasis here is that despite the exclusion of such evidence at the hearing itself, both the examiner and the Board found it desirable nevertheless to make findings on the extent of the violence—but limited to the items allowed in evidence. It is that reliance on a half-told story that emphasizes the character of the due process denial for which the employers seek relief before this Court.

Respectfully submitted,

GEO. STEPHEN LEONARD
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November 21, 1974

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

St. Louis, Mo. 63101

ROBERT C. TUCKER, CLERK

October 2, 1974

Mr. George S. Leonard
Leonard, Clammer & Flues
1225 Connecticut Avenue, N.W.
Washington, D.C. 20036

Re: No. 73-1362. Federal Prescription Service, Inc., et al. v. N.L.R.B.

No. 73-1420. Amalgamated Meat Cutters & Butcher Workmen, etc., et al. v. N.L.R.B.

Dear Mr. Leonard:

After our telephone conversation of September 30, I have discussed the situation about which we spoke with the panel of Judges to whom these cases were submitted.

The panel has directed me to advise you that it feels this Court is without jurisdiction to enter any order at this time relative to the date of judgment. The Court has directed me to state to you that you may use copies of any of the letters sent to you by this office in any appropriate motions filed by you in the Supreme Court.

I have today received a notice of filing petition for writ of certiorari indicating that the petition was filed in 73-1362, as well as 73-1420, on September 26, 1974, and now bears number 74-346 in the Supreme Court. Ap-

Dear Sirs:

We have today entered judgment in the above cases as proposed by petitioner. Certified copies of the judgment will be sent to the parties at the expiration of twenty-one days as provided by our Rules.

Very truly yours,

Robert C. Tucker
Clerk

dw

APPENDIX C

July 2, 1974

Messrs. Irving King
and Russell Woody
Suite 4750, One IBM Plaza
Chicago, Illinois 60611

Messrs. Paul S. Kuelthau
and Ronald K. Fisher
611 Olive Street
St. Louis, Missouri

Messrs. George J. Zazas
R.E. Highfield & G.H. Baker
1313 Merchants Bank Bldg.
Indianapolis, Indiana 47204

Mr. Elliott Moore
Deputy Associate General Counsel
National Labor Relations Board
Washington, D.C. 20570

Mr. George S. Leonard
Leonard, Clammer & Flues
1225 Connecticut Avenue, N.W.
Washington, D.C. 20036

Mr. Robert J. Wilson
Regional Director, Region 18
110 South Fourth St.
Minneapolis, Minnesota 55401

Re: No. 73-1362 & 73-1420. Fed. Prescription Ser., et al
v. NLRB

Dear Sirs:

Enclosed herewith to each of you is copy of certified copy of judgment of this Court entered today in the above case.[1]

Very truly yours,

Robert C. Tucker,
Clerk

eh
enc.

[1The copy of the judgment is set forth in Appendix A, *supra*.]

parently, the filing question has been satisfactorily resolved.

Very truly yours,

/s/ Robert C. Tucker
ROBERT C. TUCKER
Clerk

RCT/mm

cc: Messrs. Irving King and Russell Woody

Messrs. Paul S. Kuelthau and Ronald K. Fisher

Messrs. George J. Zazas, R.E. Highfield & G. H. Baker

Mr. Elliott Moore, Deputy Assoc. General Counsel

Mr. Robert J. Wilson, Reg. Dir.